

**Routine Program Changes
To
Commonwealth of Virginia Coastal Management Program**

**Request for Concurrence
January 2010**

**Administration of Game, Inland Fisheries, and Boating
Code of Virginia Title 29.1, Chapters 1, 3, 4, and 5**

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INTRODUCTION

The following constitutes a request by the Commonwealth of Virginia for the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) to concur with a Routine Program Change to the Commonwealth of Virginia's Coastal Management Program (CMP).

The Commonwealth of Virginia has revised the Commonwealth's enforceable policies in Code of Virginia Title 29.1 (formerly Title 29), Chapters 1, 3, 4, and 5 known as Game, Inland Fisheries and Boating. Title 29.1 addresses the authority of the Board of Game and Inland Fisheries ("Board") to promulgate rules and regulations for the protection of Virginia's inland fisheries and the administrative role of the Department of Game and Inland Fisheries ("Department") in the management and enforcement of all rules and regulations of the Board.

In accordance with requirements for Routine Program changes as set forth in the Coastal Zone Management Act (CZMA) §306(e), 15 C.F.R. §923.84, and the guidelines for Routine Program Changes contained in OCRM's Program Change Guidance from July 1996, the Commonwealth of Virginia has prepared the following analysis of the changes. The analysis: (A) explains why the proffered changes to the CMP are Routine Program Changes and not Amendments as described in 15 C.F.R. §923.80(d); and (B) identifies the enforceable policies affected, describes the nature of each program change, and examines the impact the changes have on the existing management program.

ANALYSIS

The Commonwealth submits changes to Code of Virginia Title 29.1, Chapters 1, 3, 4, and 5 as a Routine Program Change. The statutory sections governing the administration of Game and Inland Fisheries were previously approved as part of the CMP in 1986 and this submission updates these provisions to reflect minor statutory changes to the program since that time.

(A) Routine Program Change

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this analysis of the submitted change notifies OCRM of the Routine Program Change and explains why the program change will not result in an Amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of the five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization; and
- (5) coordination, public involvement and the national interest.

OCRM's Program Change guidance states that a substantial change is a high threshold based on a case-by-case determination. Such determination is made by reviewing indicators of substantial change, such as whether new or revised enforceable policies address coastal uses or resources not previously managed, or make major changes in the way a state CMP manages coastal uses or resources. OCRM's Program Change guidance also states that an explanation why a proposed change will not result in an Amendment should describe the elements of the State CMP that are affected.

The provisions being submitted are primarily recodifications giving new section numbers to the statutory provisions already approved by NOAA as part of the original CMP. In 1987, the Virginia General Assembly recodified Va. Code Title 29 - Game, Inland Fisheries and Dogs to Title 29.1 - Game, Inland Fisheries and Boating, reorganizing the prior sections for easier use, greater precision, and clarity. The following chart illustrates the pertinent Chapter locations in former Title 29 as recodified in Title 29.1.

Title 29	Title 29.1
1986	2008
Chapter 1 In General Chapter 2 Commission of Game and Inland Fisheries	Chapter 1 Administration of Game and Inland Fisheries
Chapter 5 Licenses	Chapter 3 Licenses
Chapter 6 Permits Required	Chapter 4 Permits Required
Chapter 8 General Game and Fish Laws	Chapter 5 Wildlife and Fish Laws

At the time of recodification, the Commission of Game and Inland Fisheries (Commission) was renamed the Board of Game and Inland Fisheries (Board) and the Department of Game and Inland Fisheries (Department) was created. Concurrently, the Commission's power and duties, as evidenced under particular sections of Title 29.1, Chapters 1-5, were transferred to the Board and the Department. The Commission's authority to promulgate rules and regulations for the protection of Virginia's inland fisheries was vested in the Board. At the same time, the Commission's power and duties to administer and enforce the laws and regulations were assigned to the Department. This reassignment in 1987 did not result in substantial changes to the Coastal Management Program approved in 1986.

In the same manner that the Commission's power and duties to promulgate rules and regulations and administer the CMP were dispersed throughout former Title 29, the assigned power and duties of the Department and the Board are now distributed throughout particular sections of Title 29.1. The selected sections being submitted as a

routine program change represent those sections that specifically address the vested authority of the Department and Board to regulate inland fisheries, promulgate regulations and enforce the laws and regulations under the approved CMP.

The provisions being submitted do not substantially affect the uses subject to management under the CMP, special management areas, boundaries, authorities and organization, or coordination, public involvement and national interest.

(B) Effects of Changes on Program

Statutory changes to Title 29.1 are identified in the attached table. The table provides a description and analysis of each statutory change submitted for approval as part of the CMP. The table identifies each section that deals with authority to promulgate regulations and require licenses and permits, and relates it to the existing authority in the CMP as approved in 1986. The description and analysis of each change is organized in a format that identifies the enforceable policies, describes the nature of each program change, and examines the impact the changes have on the existing management program. The following narrative briefly summarizes the recodification and changes presented in the table.

CHAPTER 1- ADMINISTRATION OF GAME AND INLAND FISHERIES

The submitted changes in Title 29.1, Chapter 1, concern the Commission of Game and Inland Fisheries and the division of its duties and authority to manage inland fisheries. In 1987, Title 29 was recodified as Title 29.1 and former Chapters 1 and 2 addressing the administration of the Commission were moved to Chapter 1. The Commission was renamed the Board of Game and Inland Fisheries and the Department of Game and Inland Fisheries was created.

The Commission's powers and duties found in former Sections 29-6 and 29-11 are now in Section 29.1-103 governing the Board, and remain largely the same. Minor additions that do not amount to a substantial change under the CMP have taken place. These include (1) a provision requiring the Board to create a Governance Manual, (2) the establishment of use fees, (3) a provision requiring the Board to elect a chairman, (4) provisions delineating the duties of the Board chairman, and (4) a provision requiring the Board to administer and manage the Virginia Fish Passage Grant and revolving Loan Fund. These changes are largely derived from the explicit duties and power previously held by the Commission to promulgate rules and regulations that conserve and promote Virginia's inland fisheries.

The Commission and the Director's powers and duties, formerly found in Sections 29-2, 29-8, 29-13, 29-14, 29-15, 29-16, 29-1.1 have been consolidated into Section 29.1-109. Minor additions to the Director's duties have been included in Section 29.1-109 to clarify the role of the Director. The Director, in addition to authority to "administer and enforce all rules of the Board," is expressly empowered to (1) make and enter into contracts incidental to the Director's powers, (2) consult with and keep informed of wildlife and

boating organizations, and (3) hire employees to assist the Board with its administrative duties. This is considered a minor change to the CMP as the Commission was previously vested with the authority to enforce *or cause to be enforced* all laws and regulations for the protection of fish in the inland waters of Virginia. Further minor changes include a provision subjecting the Director to confirmation and reconfirmation every four years. This is considered a minor change to the CMP as Section 29.1-109 (former Section 29-8) previously required the Commission (now the Board) to appoint an Executive Director to be the principal administrative officer of the Commission. Overall, the structural changes in the administrative authority over the CMP derive from the Commission's former authority and serve to improve the administration's effectiveness and consistency in carrying out the CMP.

There has been one other minor update to this part of the program. In 1989, Section 29.1-101.9 was enacted to include the ability to require fishways on obstructions beyond those obstructions declared nuisances under Section 29.1-532 (formerly Section 29-151). Section 29.1-101.9 requires that the owners of any dam or other artificial impediment to the migration of anadromous fish in any tributary of the Chesapeake Bay, after being offered funding, construct and provide fishways for anadromous fish. The purpose of the fishway is for anadromous fish to have free passage up and down streams. This change maintains consistency with the CMP, which from its inception required the Commission to focus its efforts on "opening Virginia's tidal rivers to the free passage of anadromous fish to their ancestral spawning grounds in the upper reaches of [Virginia's] rivers."¹ The Department may seek an injunction from the appropriate circuit court if the owner of a dam or other artificial impediment fails to provide for or maintain a fishway.

CHAPTER 3 - LICENSES

In 1987, Title 29 was recodified as Title 29.1 and former Chapter 5 addressing Licenses was moved to Chapter 3. There have been minor updates to the program addressing fishing licenses. The submitted changes update the penalties available to the State for violations of the State fishing license law and authorize courts to impose Class 3 misdemeanors for such violations. In 1987, clarifying language was added to ensure that persons who attempt to purchase a license after arrest or notice of summons could not escape penalties provided for in the section. These changes maintain consistency with former Title 29, Section 29-51 *et seq.* which from its inception included penalties in the statute. Also, the submitted changes expand the scope of licenses to include "any temporary license issued by a clerk or agent to a buyer and authorized to be used in a manner prescribed by the Director." This is a minor change to the existing CMP as it originally established a protocol to issue licenses for inland fishing. Finally, there has been one minor stylistic change where the legislature identifies Virginia as "Commonwealth" rather than "State."

¹ See Virginia Coastal Resources Management Program, Final Environmental Impact Statement p. III-5. 1985.

CHAPTER 4 - PERMITS

In 1987, Title 29 was recodified as Title 29.1 and former Chapter 6 addressing Permits was moved to Chapter 4. There have been minor updates to the program addressing fishing permits and their corresponding fees. Section 29.1-412 (former §§ 20-103, 29-116) requires permits for netting and certain other activities and specifies penalties. Section 29.1-416 (former §29-110) has been amended to require a fee increase to net selected fish in the inland waters of Virginia. This change maintains consistency with former Section 29-110 which from its inception required the payment of fees to net selected fish. These changes fall within the existing duties and jurisdiction of the Commission which have now been transferred to the Department and Board.

CHAPTER 5 - WILDLIFE AND FISH LAWS

In 1987, Title 29 was recodified as Title 29.1 and former Chapter 8 addressing General Game and Fish Laws was transferred to Chapter 5. The Commission's authority under former § 29-126 to promulgate regulations pertaining to the taking, capture, killing, possession, sale, purchase and transportation of inland water fish was transferred to the Board. This transfer is delineated under Section 29.1-501 A.

In addition, former §§ 29-233 and 29-234 were consolidated to form Section 29.1-566. The former sections authorized the Board, by regulation, to adopt endangered or threatened species from the federal list. The newly consolidated Section 29.1-566 requires the Board to consider recommendations from the Director of the Department of Conservation and Recreation and from other reliable data sources before the Board may declare a species endangered or threatened. Although the previous sections were not submitted as part of the original CMP, the Commission's authority to regulate, conserve and replenish depleted native fish and wildlife was part of its original authority to regulate granted in former §§29-125, 29-126, which were submitted and approved in 1986, and Virginia seeks approval at this time.

The Board, like the Commission, is required to publish regulations. Former Section 29-128.1 required the Commission to publish the regulations in specified locations. Section 29.1-504 requires publication to occur in a handbook or pamphlet, and proposed regulations must be filed in the Virginia Register.

In addition, minor amendments to the penalties section have been included in Chapter 5. Section 29.1-505 (former Section 29-129), has been amended to impose a Class 3 misdemeanor for violating any of the regulations pursuant to Title 29.1. This is considered a minor addition to the existing penalty requirement under the CMP as monetary fines and imprisonment were formerly prescribed in Section 29-129. Also, Section 29.1-505.1, enacted in 1989, makes it unlawful to conspire to commit any offense defined in Title 29.1.

Finally, Section 29.1-531 (former 29-148) makes it unlawful to take, possess, sell, or transport fish unlawfully. Prohibitions formerly imposed on trout and bass have been

expressly expanded to include all game fish. The Board was required to create and implement a trout identification system. Under the existing CMP policy, fishery biologists are required to evaluate fish stocks to assure healthy fish populations.² These amendments reflect such evaluations and policy. In addition, enumerated fish may not be sold for commercial purposes.

Section 29.1-532 (formerly 29-151) continues to make obstructions to navigation or the passage of anadromous or migratory fish a nuisance, with limited exceptions. The list of locations and fine were simplified in 1987 with the recodification, and the fine based on one percent of fishway construction cost.

Chronology of Changes

1987 Changes: Title 29 was replaced with Title 29.1. At the time of approval of Virginia's CMP, former Va. Code § 29-1 *et seq.* and § 29-3 *et seq.* set out the duties of the Commission and its Executive Director. The Virginia General Assembly recodified these to Va. Code 29.1-100 *et seq.*, assigning the administration of Game and Inland Fisheries to the Board and the Department. The Board is required to appoint a Director, who carries out the duties previously assigned to the Executive Director of the Commission. The Commission's authority to promulgate rules and regulations was assigned to the Board. The Virginia General Assembly recodified the Licenses chapter in Va. Code § 29-51 *et seq.* to Title 29.1-300 *et seq.* and substituted the term "Commonwealth" for the term "State." Legislation clarified the fact that persons buying fishing licenses subsequent to arrest or notice of summons could not escape penalties. The Virginia General Assembly recodified former Va. Code § 29-93 *et seq.* to Va. Code 29.1-400 *et seq.* The Commission's authority to promulgate rules and regulations in former Va. Code § 29-126 *et seq.*, was recodified for the Board at §29.1-501 *et seq.* The legislature amended the publications requirement for new, proposed regulations, the penalties imposed for violating the statute, and prohibitions on the purchase or sale of specified game fish.

1988 Changes: For permits for netting fish, the legislature substituted "three dollars and fifty cents" for "two dollars", substituted "seventeen dollars and fifty cents" for "ten dollars" and substituted "forty five dollars" for "twenty five dollars."

1989 Changes: The legislature enacted Section 29.1-101.9 to allow the Commission to require fishways not provided for in Section 29.1-532 (formerly Section 29-151). The legislature specified a Class 3 misdemeanor penalty for hunting, trapping or fishing without a license. The legislature added an annual \$350 nonresident harvester's permit fee for each boat used to take or catch fish in Back Bay and its tributaries.

1992 Changes: The legislature expanded the Board's duties to include the administration and management of the Virginia Fish Passage Grant and Loan Fund.

² See Virginia Coastal Resources Management Program, Final Environmental Impact Statement, p. III-5, 1985.

1994 Change: The legislature added Subsection E to 29.1-531 that makes it “unlawful to offer for sale, sell, offer for purchase, or purchase at any time or in any manner species of game fish or the carcass or any part thereof, except as specifically permitted by law and only by the mean and within the numbers stated. A violation of the provisions of this subsection shall be punishable as provided in § 29.1-553.” This prohibition on sale of game fish was previously in subsection B, which prohibited unlawful takes.

1997 Changes: The legislature omitted fyke net from the list of specified nets required to obtain a permit.

2000 Change: The legislature expanded the term license to include temporary licenses. The legislature allowed hatchery trout to be sold for other reasons besides human consumption. The legislature also required the Board to establish a trout identification system for those trout offered for sale or for other uses directed by the Board.

2003 Change: The legislature authorized the Board to establish an admittance, parking and other use fees at Department owned facilities.

2004 Changes: The legislature authorized the Board to establish an annual hunting stamp. In addition, the legislature authorized the Board to promulgate fishing fees.

2006 Changes: The legislature defined the duties of the Board chairman. The legislature also required the Board to develop a Governance Manual and subjected the Director of the Department to confirmation and reconfirmation by the General Assembly every four years.

2007 Changes: The legislature authorized the Board to increase or decrease license fees for nonresidents by no more than \$50, and no more than every three years.

Conclusion

The proposed program changes do not substantially affect the uses subject to management under the CMP, special management areas, boundaries, authorities and organization, or coordination, public involvement and national interest. Virginia requests concurrence in this Routine Program Change.